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January 29, 2003

Ms. Marlene Dortch
Secretary
Federal Communications Commission
445 12th Street, SW, Room TWB-204
Washington, DC 20554

Re: Notice of Written Ex Parte Communication, *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket Nos. 01-338, 96-98 and 98-147

Dear Ms. Dortch:

This letter responds to the January 17, 2003 letter submitted in the above-captioned proceeding by Dee May, Executive Director, Federal Regulatory, Verizon, on behalf of BellSouth Corporation, SBC Communications Inc., Qwest Communications International Inc., and the Verizon telephone companies ("May letter"). In that letter, the Bells propose that the Commission free them from the requirements imposed by 47 U.S.C. § 252(i), the "pick and choose" requirement of the 1996 Act. Specifically, the Bells request that the Commission: (i) eliminate the pick and choose obligation entirely by requiring requesting carriers to opt into entire interconnection agreements only (May letter at 3); or (ii) eliminate the pick and choose obligation with respect to "de-listed" network elements (*id.* at 2). The Commission must reject each of these proposals. First, the Administrative Procedure Act bars the Commission from eliminating the rule in the absence of adequate notice regarding its intention and the opportunity for interested parties to comment. Moreover, each of the Bells' requests is foreclosed by the plain language of the Act, existing Commission precedent, and the pro-competitive policies underlying the Act.

The APA Requires that Any Proposal to Eliminate the Pick and Choose Rule Be Subject to Adequate Notice and Comment.

First, the short answer to the Bells is that the Administrative Procedure Act precludes the Commission from eliminating its "pick and choose" rule in this proceeding because the Commission has not provided adequate notice, and afforded the opportunity for comment, regarding any intention to modify the rule. Although agencies can interpret

rules in a manner that alters their application or waive the application of rules in particular circumstances,[1] the APA requires that agencies undertake wholesale revisions to legislative rules only through notice and comment rulemaking.[2] Repealing or otherwise eliminating Rule 51.809 falls within none of the APA's exceptions to the notice and comment requirement. *See* 5 U.S.C. §§ 553(a)-(d). "[T]he APA expressly contemplates that notice and an opportunity to comment will be provided prior to agency decisions that repeal a rule," *Consumer Energy Council v. FERC*, 673 F.2d 425, 446 (D.C. Cir. 1982), *aff'd*, 463 U.S. 1216 (1983). In this proceeding, the NPRM provides notice regarding reconsideration of its rules implementing Sections 251(c)(3) and 251(d)(2), but does not provide adequate notice or seek comment regarding wholesale revision, much less elimination, of Rule 51.809.[3] Without such notice, the Bells' proposed revision of the rule would be unlawful.

Elimination of the Pick and Choose Obligation Would Violate the Plain Language and Pro-Competitive Policies of the Act.

Section 252(i) requires an incumbent LEC to "make available any interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions." As the Commission correctly found in the *Local Competition Order*,[4] requesting carriers' rights under section 252(i) "maximize competition by ensuring that carriers obtain access to terms and conditions on a nondiscriminatory basis," 11 FCC Rcd. at 16140, ¶ 1316, and are "central to the statutory scheme and to the emergence of competition" (*id.* at 16137, ¶ 1309). In rejecting the incumbent LECs' argument that requesting carriers should be limited to opting into entire agreements only, the Commission held that adopting such a limitation would conflict with, and "would render as mere surplusage," the statutory language requiring incumbent LECs to make available "any interconnection, service or network element." *Id.* at 16138, ¶ 1310. The Supreme Court subsequently affirmed the Commission's pick and choose rule (47 C.F.R. § 51.809) as "not only reasonable," but "the most readily apparent" interpretation of the statute. *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 396, 119 S.Ct. 721, 738 (1999). In doing so, the Court also observed that the Commission's rule is, in some respects, "more generous to

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[1] *See WAIT Radio v. FCC*, 418 F.2d 1153, 1157-59 (D.C. Cir. 1969).

[2] *See* 5 U.S.C. §§ 553(b) ("General notice of proposed rule making shall be published in the Federal Register …"), 551(5) (rulemaking is "agency process for formulating, amending or repealing a rule"); *Sprint Corp. v. FCC*, 2003 WL 139438, at 4-5 (D.C. Cir. Jan. 21, 2003).

[3] *See, e.g., National Mining Ass'n v. Mine Safety and Health Admin.*, 116 F.3d 520, 531 (D.C. Cir. 1997) (final rule must be "logical outgrowth" of agency proposal); *Horsehead Resource Dev. Co. v. Browner*, 16 F.3d 1246, 1267 (D.C. Cir. 1994).

[4] *Local Competition Provisions in the Telecommunications Act of 1996,* First Report and Order, CC Docket No. 96-98, 11 FCC Rcd. 15499, FCC 96-325 (1996) ("*Local Competition Order*").

incumbent LECs than § 252(i) itself."[5] The Bells' current proposal would stand all of that on its head.

As interpreted by the Commission and affirmed by the Supreme Court, the Act requires that incumbent LECs make available to requesting carriers any interconnection, service, or network element contained within an approved interconnection agreement. The Commission thus cannot eliminate this pick and choose right by requiring an adopting carrier to accept an entire interconnection agreement in order to take advantage of a portion of such agreement. The Bells' request that the Commission issue a blanket exemption for de-listed network elements likewise cannot be squared with the language of the Act, Commission precedent or public policy. Nor is this the proper forum for such a determination. As the Commission recently held when faced with a similar request by Qwest,[6] determinations as to what matters should be included within interconnection agreements to be filed with, and approved by, the states – and thus to be subject to § 252(i) – should be made by State commissions, which are best positioned to make these decisions. 17 FCC Rcd. at 19341, ¶ 10. The Commission therefore must reject each of the Bells' proposals.

1. The plain language of the Act, Commission precedent and public policy prohibit the Commission from eliminating the pick and choose obligation.

The Act requires that incumbent LECs make available to requesting carriers – on the same terms and conditions – any interconnection, service or network element contained in an approved interconnection agreement. In the *Local Competition Order*, the Commission specifically rejected the argument that the Bells reprise here, *i.e.*, that permitting competitive carriers to opt into less than an entire agreement would destroy incumbent LECs' ability to engage in arm's length commercial negotiations. As the Commission correctly held, the incumbents' "all or nothing" approach to this statutory requirement conflicts with the plain language of the Act. And critically in this context, the Supreme Court endorsed this determination as the most readily apparent interpretation of the statute.

Basic principles of administrative law also preclude the Bells' proposed wholesale elimination of the "pick and choose" obligation. First, the Commission can adopt only rules that are consistent with the Act, and nothing in *AT&T Corp. v. Iowa Utils. Bd.*, or *Chevron*[7] supports the Bells' claim that the Commission has authority to eliminate the obligation. According to the Bells, the Supreme Court's interpretation of section 251(i)

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[5] 525 U.S. at 396, 119 S.Ct. at 738. The Court noted that the Commission's rule exempted incumbent LECs from its requirements if the ILEC proved to the State commission that providing the interconnection, element, or service was either (1) more costly than providing it to the original carrier, or (2) technically infeasible. *Id.*

[6] *Qwest Communications International Inc. Petition for Declaratory Ruling on the Scope of the Duty to File and Obtain Prior Approval of Negotiated Contractual Arrangements under Section 252(a)(1)*, Memorandum Opinion and Order, W.C. Docket No. 02-89, 17 FCC Rcd. 19337, FCC 02-276 (Oct. 4, 2002) ("*Qwest Order*").

[7] *Chevron U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

was conducted under the "second step" of *Chevron*, "thus making clear that the Commission has statutory authority either to eliminate or to retain the pick and choose rule" May letter, at 4 n.4 This is incorrect as a matter of logic and law. Nothing about the Court's holding that Rule 51.809 is a reasonable interpretation of a nearly identically worded statute indicates that eliminating the rule or adopting a directly contrary interpretation would be reasonable. To the contrary, *Chevron* makes clear that the Commission cannot adopt a policy that is contrary to the statute, *see* 467 U.S. at 866, and an interpretation that negated the LECs' statutory obligation to "make available any … network element" would impermissibly contradict the statute's terms.

Second, contrary to their suggestion, the Bells' proposed elimination of the rule would not have the effect of eliminating the statutory access obligation. The Bells urge the Commission to "[e]liminate the pick-and-choose rule entirely" and argue that "[t]he Commission has ample authority to eliminate the pick-and-choose rule and thus limit opt-in rights to entire agreements, for nothing in § 252(i) required it to adopt that rule in the first place." May letter, at 3. If the Commission were simply to repeal the rule, the statutory entitlement would of course continue to apply and to bind the Bells and the State commissions. *See* 47 U.S.C. § 252(i). To the extent the Bells in fact seek not elimination of the rule, but instead a new rule that does not permit access to "any … network element," then the Bells are simply incorrect that the Commission's initial discretion to implement Rule 51.809 also provides it with discretion to adopt a rule that is contrary to the statute.[8]

Faced with the plain language of the Act, which the Commission and the Supreme Court found was squarely at odds with the Bells' all-or-nothing approach to section 252(i), the Bells are forced to argue here that public policy supports a reversal of the Commission's decision and somehow permits the Commission to ignore the language of the statute. Yet, despite their protestations to the contrary, the same public policy interests that supported the Commission's adoption of the pick and choose rule in 1996 exist today. Although the Act has been in effect for nearly seven years, the Bells still control bottleneck facilities critical to local exchange competition, and they have not hesitated to use their bottleneck power to obstruct competitive local entry. Just as in 1996, failure to make provisions of interconnection agreements available on an unbundled basis "could encourage an incumbent LEC to insert into its agreement onerous terms for a service or element that the original carrier does not need, in order to discourage subsequent carriers from making a request under that agreement." *Local Competition Order*, 11 FCC Rcd. at 16138, ¶ 1312. And, in sharp contradiction to the incumbents' claims that the pick and choose rule delays the introduction of competitive services, the Commission rightly found

[8] None of the cases the Bells cite contradicts these basic principles or provides any other basis to support their proposed course of action. Those cases stand for the simple proposition that an agency may, following appropriately formal procedures and adequately explaining its choice, revisit a prior rule and substitute a different, reasonable interpretation of a governing statute. *See Adelphia Communications Corp. v. FCC*, 88 F.3d 1250, 1255 (D.C. Cir. 1996); *Oxy USA Inc. v. FERC*, 64 F.3d 679, 690 (D.C. Cir. 1995); *Clinchfield Coal Co. v. Federal Mine Safety & Health Review Comm'n*, 895 F.2d 773, 778 (D.C. Cir. 1990). The cases do not establish either that an agency can eviscerate a legislative rule without appropriate notice and comment or that an agency can adopt a rule that is inconsistent with the statute it purports to apply or interpret.

that access to individual agreement provisions will actually "*speed* the emergence of robust competition." *Id.* at 16139, ¶ 1313 (emphasis added).

Events since 1996 confirm the Commission's assessment of marketplace realities. In 2000, MCI WorldCom petitioned the Commission for an expedited declaratory ruling to help minimize incumbent LEC foot-dragging in connection with carriers' requests to opt into interconnection agreements under section 252(i).[9] The competitive LECs unanimously demonstrated that incumbent LECs imposed numerous obstacles and unreasonable delay when CLECs attempted to opt into existing interconnection agreements.[10] Indeed, competitive LECs – the claimed beneficiaries of the Bells' proposed elimination of the pick and choose rule –unanimously opposed elimination of the rule and called for increased and expedited enforcement of the rule.

Similarly, in response to mPower's request in 2001 that the Commission exempt "FLEX contracts" from the scope of section 252(i), the CLEC commenters demonstrated that incumbent LECs have little or no incentive to negotiate with potential competitors and every incentive to engage in discrimination in order to prevent any significant erosion of their local monopolies.[11] The CLECs also confirmed that the mere ability to opt into an entire "FLEX contract" was patently insufficient to eliminate the potential for unfair and unjust discrimination by incumbent LECs because such carrier-specific agreements would not be usable by other providers.[12] Those fears have been borne out by recent experience. Qwest's action in conferring secret, preferential interconnection "deals" on selected competitive LECs in exchange for their "acquiescence" in Qwest's broader regulatory agenda vividly demonstrates that interconnection agreements must be filed with and approved by State commissions, and that CLECs must be permitted to exercise their pick and choose rights under the Act in order to rein in the incumbents' seemingly irresistible desires to discriminate among carriers, to delay competitive entry, and otherwise to use their bottleneck position to preserve their monopolies.

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[9] *MCI WorldCom, Inc. Petition for Expedited Declaratory Ruling Regarding the Process for Adoption of Agreements Pursuant to Section 252(i) of the Communications Act and Section 51.809 of the Commission's Rules,* CC Docket No. 00.45 ("*MCI WorldCom Petition*")

[10] *Id.,* Reply Comments of AT&T Corp. (filed April 11, 2000).

[11] *See, e.g.,* Reply Comments of AT&T Corp., *Petition of mPower Communications Corp. for Establishment of New Flexible Contract Mechanism Not Subject to "Pick and Choose",* CC Docket No. 01-117 (filed July 18, 2001), at 2-3 (citing comments by ASCENT, Covad Communications Co., Focal Communications Corp., Sprint Corp., WorldCom, Inc., and Z-Tel Communications).

[12] *Id.* at 4.

2. State commissions may impose unbundling obligations for network elements that are not on the national list and such elements would be subject to the pick and choose requirement.

Apparently recognizing that the plain language of the Act mandates the Commission's pick and choose rule, the Bells also request more limited "relief" and ask the Commission to issue a blanket exemption from the rule for "de-listed" network elements, because – according to the Bells – any agreements concerning such elements would not arise under section 251 or 252. But, the Commission's mere removal of a network element from the national list of elements that must be unbundled does not compel such a draconian result. As AT&T has demonstrated previously,[13] the 1996 Act allows State commissions to exceed the national "floor" with respect to unbundled network elements. Thus, section 251(d)(3) specifically preserves the power of State commissions to impose unbundling requirements that exceed those established by the Commission. In addition, section 252(e)(3) permits a State commission to establish or enforce unbundling obligations under state law in an agreement approved under section 252. A State commission thus could impose, under either federal or state law, a requirement that an incumbent LEC provide access to a network element and require inclusion of this obligation in an approved interconnection agreement. Section 252(i) would require the incumbent LEC to make that network element available to other carriers on the same terms and conditions.

Moreover, adoption of the ILECs' proposed blanket exemption would allow incumbent LECs to engage in regulatory gamesmanship to discriminate with respect to their 251 obligations. For example, an incumbent LEC could provide a favored CLEC with preferential "commercial" terms and conditions as part of a package deal in which the CLEC would obtain far less favorable terms and conditions for unbundled network elements in order to disguise the true financial arrangement between the parties and thus discriminate against other competitors. Clearly, where such a package deal exists, public policy and the pro-competitive goals of the Act would warrant a State commission finding that each of the provisions of the deal was a separate term and condition of an interconnection agreement that must be available separately under the pick and choose rule.

The Bells nevertheless contend that the Commission's recent *Qwest Order* regarding incumbent LECs' obligation to file interconnection agreements with State commissions mandates their requested blanket exception. It does not. In that decision, the Commission studiously declined "to establish an exhaustive, all-encompassing 'interconnection agreement' standard," and further declined "to address all the possible hypothetical situations presented in the record," including the hypothetical now posed by the Bells. *Qwest Order*, 17 FCC Rcd. at 19341-42, ¶¶ 10 –11. Indeed, with the exception

[13] *See, e.g.*, letter dated December 18, 2002, from Mark C. Rosenblum, AT&T, to Honorable Michael K. Powell, Kathleen Q. Abernathy, Jonathan S. Adelstein, Michael J. Copps, Kevin J. Martin, filed in CC Docket No. 01-338; at 4-15; letter dated November 13, 2002, from James W. Cicconi, AT&T, to Honorable Michael K. Powell, Kathleen Q. Abernathy, Michael J. Copps, Kevin J. Martin, filed in CC Docket Nos. 01-338, 96-98, and 98-147, at 5-7.

of settlement agreements involving backward-looking consideration (cash payment or cancellation of an unpaid bill), order and contact forms, and agreements with bankrupt competitors entered into at the direction of a bankruptcy court or trustee, the Commission refused to opine on what types of interconnection agreements should, or should not, be filed with State commissions. Instead, the Commission deferred to State commissions, which "are well positioned to decide on a case-by-case basis whether a particular agreement is required to be filed as an 'interconnection agreement.'" *Id.* at 19341, ¶ 10.

In sum, the Act preserves the right of State commissions to impose additional unbundling obligations on incumbent LECs, and precludes the Commission from interfering with State commission exercise of this authority. The Bells' request for a blanket exemption for certain network elements therefore must be denied.

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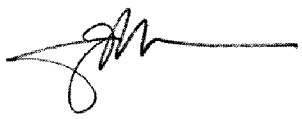
The Administrative Procedure Act bars the Commission from eliminating the pick and choose rule because the Commission has not provided adequate notice of any intention to do so nor the opportunity for interested parties to comment. Moreover, the Commission has already determined that the pick and choose rule is compelled by the plain language of section 252(i), and this decision was endorsed by the Supreme Court as the most reasonable reading of the Act. The Commission therefore cannot eliminate this rule, and the Bells have articulated no justifiable policy reason for doing so. Nor can the Bells justify their proposed blanket exemption from the Act's pick and choose obligations for certain network elements, because the Act specifically preserves to State commissions the right to designate additional network elements for unbundling. Further, as the Commission recently has made clear, any question regarding which agreements are required to be filed with State commissions – and thus, which network elements are subject to the pick and choose obligation – should be directed to State commissions, which are in the best position to make such determinations. For all of these reasons, the Bells' proposals must be denied.

Consistent with Commission rules, I am filing one electronic copy of this notice and request that you place it in the record of the above-referenced proceedings.

Sincerely,



Joan Marsh

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